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9 Attorneys for Plaintiff Sony Corporation

10 UNITED STATES DISTRICT COURT  
11 CENTRAL DISTRICT OF CALIFORNIA  
12 WESTERN DIVISION

13 SONY CORPORATION, A Japanese  
14 corporation,

15 Plaintiff,

16 vs.

17 VIZIO, INC., a California corporation,

18 Defendant.

CASE NO. 08-01135 (RGK) (FMOx)

**PLAINTIFF SONY  
CORPORATION'S *EX PARTE*  
APPLICATION FOR LEAVE TO  
FILE SUR-REPLY IN SUPPORT OF  
ITS OPPOSITION TO VIZIO'S  
MOTION TO FILE ITS PROPOSED  
AMENDED ANSWER,  
AFFIRMATIVE DEFENSES AND  
COUNTERCLAIMS; AND  
MEMORANDUM OF POINTS AND  
AUTHORITIES**

[SUPPLEMENTAL DECLARATION  
OF JAIME A. SIEGEL, [PROPOSED]  
SUR-REPLY, AND [PROPOSED]  
ORDER FILED CONCURRENTLY  
HEREWITH]

Judge: Hon. R. Gary Klausner


1 TO ALL PARTIES AND THEIR ATTORNEYS OF RECORD:

2 PLEASE TAKE NOTICE that Pursuant to *Local Rule 7-19*, Plaintiff Sony  
3 Corporation (“Sony”) will, and hereby does, apply *ex parte* for an order granting  
4 leave to file the attached sur-reply and accompanying declaration in response to  
5 Vizio’s reply to Sony’s opposition to its motion to file its proposed amended  
6 answer, affirmative defenses, and counterclaims.

7 Pursuant to *Local Rules 7-19* and *7-19.1*, on May 15, 2009 counsel for Sony  
8 notified Vizio’s counsel of the date, time, and substance of this *ex parte* application.  
9 Notice was given via voice-mail message to James L. Wamsley III and Stephen Corr  
10 of Jones Day. Additional notice was given via electronic email to each of those  
11 individuals, as well as through a telephonic conversation with Mr. Corr. Vizio’s  
12 counsel opposes this application. The name of Vizio’s counsel is James L.  
13 Wamsley III of Jones Day. Mr. Wamsley’s business address is 901 Lakeside  
14 Avenue, Cleveland, Ohio 44114; phone: 216-586-3939.

15  
16  
17 DATED: May 15, 2009

QUINN EMANUEL URQUHART OLIVER &  
HEDGES, LLP

18  
19 By  /for  
20 Kevin P.B. Johnson  
21 Attorneys for Plaintiff Sony Corporation  
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1                                    **MEMORANDUM OF POINTS AND AUTHORITIES**

2            Plaintiff Sony Corporation (“Sony”) submits this *ex parte* application for an  
3 order granting leave to file the attached sur-reply and accompanying declaration in  
4 response to Vizio’s reply to Sony’s opposition to its motion to file its proposed  
5 amended answer, affirmative defenses, and counterclaims.

6            Sony submits this application to address new arguments and evidence that  
7 Vizio raised in its reply memorandum and accompanying declaration of James L.  
8 Wamsley, III concerning the parties’ licensing negotiations. Vizio argues for the  
9 first time in its reply papers that its newly-acquired QAM cable tuner patents should  
10 be added to the pending lawsuit because the parties sought to resolve their  
11 differences through a “cross-license” of their respective patents. (Vizio Br. at 1, 6.)

12           But as Sony’s proposed sur-reply explains, the arguments and statements in  
13 Vizio’s brief and supporting declaration are inaccurate and misleading. To allow  
14 Vizio to introduce these misleading materials for the first time in its reply without  
15 allowing an opportunity for a response would prejudice Sony. Indeed, it is well-  
16 accepted that a party may not raise new arguments or evidence in a reply, and that  
17 failure to do so in its opening papers waives the argument. *See Bazuaye v. INS*, 79  
18 F.3d 118, 120 (9th Cir. 1996) (“Issues raised for the first time in the reply brief are  
19 waived.”); *Provenz v. Miller*, 102 F.3d 1478, 1483 (9th Cir. 1996) (finding that  
20 court should not consider new evidence in a reply without affording the non-movant  
21 an opportunity to respond); *Contratto v. Ethicon, Inc.*, 227 F.R.D 304, 309 n.5 (N.D.  
22 Cal. 2005) (finding that declaration submitted with reply was improper to the extent  
23 it introduced new evidence). Should the Court elect to consider the new arguments  
24 despite Vizio’s waiver, Sony should be allowed to respond via a brief and narrowly  
25 focused sur-reply.

26           In addition to responding to Vizio’s new evidence and argument, Sony also  
27 wishes to inform the Court that on May 13, 2009, Sony filed a declaratory judgment  
28 action against Vizio in the Southern District of California based on the newly-

1 acquired patents that Vizio seeks leave to add to this action. Because Vizio may  
2 contend the filing of this action bears upon the Court's resolution of the present  
3 motion, Sony seeks leave to bring this matter to the Court's attention—and explain  
4 why it should not bear on Vizio's motion to amend—through the requested sur-  
5 reply.

6 In light of these two narrow issues, Sony accordingly respectfully requests  
7 that the Court grant its motion for leave to file the attached sur-reply.

8  
9 DATED: May 15, 2009

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HEDGES, LLP

10  
11 By  /for  
12 Kevin P.B. Johnson  
13 Attorneys for Plaintiff Sony Corporation  
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